

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 12, 2006 Session

**ANN MARGARET KALISZ SHOFNER, M.D. v. ROBERT JACKSON,
ET AL.**

**Appeal from the Circuit Court for Davidson County
No. 04C-1016 Tom E. Gray, Chancellor**

No. M2006-00150-COA-R3-CV - Filed on March 30, 2007

The plaintiff appeals the summary dismissal of her legal malpractice action against the attorneys who represented her in a custody and divorce action. The plaintiff contends they committed malpractice by mishandling the custody matter and by withdrawing as her counsel after the custody hearing but before the resolution of the financial matters involved in the divorce. The trial court held the plaintiff's action was barred by the statute of limitations. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., joined. WILLIAM C. KOCH, JR., P.J., M.S., filed a concurring opinion.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Ann Margaret Kalisz Shofner, M.D.

Tom Corts, Nashville, Tennessee, for the appellee, Robert L. Jackson and Larry Hayes, Jr., d/b/a Jackson, Kweiler, McKinney, Moore, Warden & Hayes.

OPINION

In April 2001, Dr. Ann Margaret Shofner hired the law firm of Jackson, Kweiler, McKinney, Moore, Warden & Hayes to represent her in a divorce and custody action. At issue in that action was the custody of the couple's three minor children and the division of the marital estate. The divorce action was bifurcated, with the custody dispute tried first, and Robert Jackson and Larry Hayes represented Dr. Shofner during the custody dispute.

The custody dispute was tried over four days in July and August 2002, and it resulted in Dr. Shofner receiving custody of the parties' oldest child, and her former husband being awarded custody of the couple's two youngest children. The trial court issued a memorandum opinion regarding the custody decision on September 19, 2002, and indicated that it relied heavily on the

recommendations of Dr. Elmer Potts, a court appointed psychologist who had evaluated the parties and their children.

Dr. Shofner, through Mr. Jackson and Mr. Hayes, continued to litigate the case by filing a Motion to Alter or Amend, to order a new trial, to stay enforcement of the September order, or to grant permission for an interlocutory appeal. By March 2003, the trial court refused to vacate or otherwise alter the September order, and the court set the remaining divorce matters for trial on June 10, 2003. Dr. Shofner contacted Mr. Jackson and Mr. Hayes on March 21, 2003, with some questions regarding her case, and she was informed at that time that Mr. Jackson and Mr. Hayes were no longer willing to serve as her counsel and were withdrawing from her case. Dr. Shofner protested to no avail, and subsequently requested that they wait one week before withdrawing to enable her to secure new counsel.

Mr. Jackson and Mr. Hayes filed their Motion for Withdrawal on March 28, 2003, and on April 7, 2003, the trial court entered an order permitting the withdrawal, which order allowed Dr. Shofner ten days to secure new counsel; however, the court declined to reset the June 10, 2003, trial date regarding the financial issues in the divorce action.

Dr. Shofner then hired attorney Dorothy Pounder to represent her. Thereafter, in May of 2003, Dr. Shofner and her former husband entered into mediation regarding the financial issues which resulted in an agreement that was presented to the Court for approval. The trial court approved the Property Settlement Agreement in June 2003. Thereafter Dr. Shofner hired appellate counsel to appeal the custody decision. After reviewing the file, appellate counsel advised Dr. Shofner that Mr. Jackson and Mr. Hayes committed several acts of legal malpractice. Based on the advice of counsel, Dr. Shofner filed a legal malpractice action on April 7, 2004, in which she contends her former attorneys committed malpractice in the custody dispute by failing to secure evidence and witnesses and by refusing to file certain documentation that would determine custody of the children. With regard to the financial issues involved in the divorce, she contends they committed malpractice by withdrawing at a critical time in the proceedings without leaving her sufficient time or means to obtain new counsel and protect her interests.

On June 9, 2005, the defendants filed a Motion for Summary Judgment contending the legal malpractice action was barred by the one-year statute of limitations. On December 2, 2005, the trial court conducted a hearing on the defendants' Motion for Summary Judgment. The trial court found that Dr. Shofner's injury occurred on March 21, 2003, the date that the defendants notified her of their intent to withdraw as counsel and that Dr. Shofner did not file a Complaint until April 7, 2004. Based on these findings, the court granted the defendants' Motion for Summary Judgment. Dr. Shofner appeals.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advert. & Publ'g Co. v. Johnson*,

100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farmers Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

The defendants insist that no malpractice occurred. Nevertheless, to address the issues raised by Dr. Shofner, the defendants assert, based upon the *arguendo* assumption the facts alleged by Dr. Shofner constitute malpractice, that Dr. Shofner's claim is barred by the statute of limitations.

Since the issue on appeal comes to us upon a summary dismissal of Dr. Shofner's action, we must consider the evidence in the light most favorable to Dr. Shofner and resolve all reasonable inferences in her favor. *See Godfrey*, 90 S.W.3d at 695. Furthermore, since the sole issue on appeal pertains to the statute of limitations, we must ascertain the point in time when Dr. Shofner knew of the facts she alleges to be malpractice.

Dr. Shofner's claim for malpractice is twofold. First, she alleges malpractice with respect to the conduct of Mr. Jackson and Mr. Hayes during the custody dispute. Second, she alleges malpractice with respect to their withdrawing from her case.

An action against an attorney for malpractice, whether based in contract or tort, must be filed within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104(a)(2).

A cause of action for legal malpractice accrues and the statute of limitations commences when: (1) the attorney had committed negligence; (2) the defendant's negligence causes the plaintiff to suffer a legally cognizable or actual injury; and (3) the plaintiff knows, or in the exercise of reasonable care and diligence should have discovered the existence of facts constituting negligence by the attorney at the injury caused thereby.

Hartman v. Rogers, 174 S.W.3d 170, 173 (Tenn. Ct. App. 2005)(other citations omitted).

A plaintiff need not know that an injury constitutes a breach of the appropriate legal standard in order to discover that a right of action exists. *Carvell v. Bottoms*, 900 S.W.2d, 23, 28 (Tenn.1995) (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn.1994)). “The plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he had suffered an injury as a result of a wrongful conduct.” *Id.*

In litigation, the most easily identifiable time when rights, interests, and liabilities become fixed is when a court enters judgment. A judgment, after all, is “an adjudication of the rights of the parties in respect to the claim[s] involved. Accordingly, most courts have made the entry of an adverse judgment the starter pistol for the running of the statute of limitations on litigation malpractice. It is a court's judgment that decrees the loss of a right or remedy or imposes a legal liability. Thus, when a judgment is entered, a “legally cognizable injury” occurs.

Cherry, 36 S.W.3d at 84-85 (internal citations omitted).

Dr. Shofner contends she suffered an injury as a result of the defendants’ acts and omissions with regard to the outcome of the custody dispute. Specifically, she asserts the defendants committed malpractice because of, *inter alia*, their failure to depose Dr. Potts, the child psychologist, to identify certain witnesses on the witness list for the custody hearing, and to call certain witnesses and introduce certain evidence. In granting the defendants’ Motion for Summary Judgment, the trial court noted that the various acts and omissions by the defendants of which Dr. Shofner complains occurred during the custody hearing in August of 2002, which Dr. Shofner attended. Moreover, the record reveals the judge in the domestic case commented during the hearing that she believed Dr. Shofner’s attorneys were “flying blind” without having a deposition of Dr. Potts. Thus, when the domestic court entered the September 19, 2002, order awarding custody of two of Dr. Shofner’s children to their father, Dr. Shofner was not only of the belief, but also on notice, based on the comments of the trial judge, that her lawyers may have mishandled the case.

Although the statute of limitations may have commenced on September 19, 2002, with respect to the custody issues, the trial court held that March 21, 2003, was the latest date on which

Dr. Shofner should have known there was a problem that could amount to a legal injury supporting a legal malpractice action. This, the trial court explained, is because it should give Dr. Shofner the latest possible date to start the running of the statute of limitations.

By March 21, 2003, Dr. Shofner knew that the custody hearing was not resolved in her favor and that the defendants were not willing to continue to act as her counsel for purposes of appealing the custody decision. She also knew that the trial court did not allow her witnesses to testify during the custody hearing and that even the trial judge found fault with the failure of the defendants to depose Dr. Potts. Thus, with regard to the alleged malpractice relating to the custody dispute, the statute of limitations began to run, at the latest, on March 21, 2003.¹ Therefore, Dr. Shofner's malpractice action related to the handling of the custody dispute, which she filed on April 7, 2004, is barred by the statute of limitations.

Likewise, the statute of limitations began to run on March 21, 2003 with respect to the resolution of the financial matters involved in the divorce. Dr. Shofner knew on March 21, 2003, that the defendants were not going to represent her in these matters, and she knew she would have to immediately hire a new attorney to represent her during the hearing on the financial issues on June 10, 2003. Thus, Dr. Shofner knew or should have known that a wrong occurred, at least in her mind, as soon as the defendants told her they would not continue to represent her and she had to obtain new counsel on short notice. The harm, she contends, was the withdrawal of her counsel and the need to quickly hire new counsel to handle her case.

IN CONCLUSION

Dr. Shofner had a right of action against which the statute began to run once she knew, or should have known, facts indicating harm caused by her lawyers' acts or omissions. *Cherry*, 36 S.W.3d at 85. The undisputed facts demonstrate that Dr. Shofner believed, and thus knew by March 21, 2003, that she had suffered a harm caused by the defendants' acts or omissions. Thus, her action for legal malpractice is barred by the statute of limitations.

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Dr. Ann Margaret Kalisz Shofner.

FRANK G. CLEMENT, JR., JUDGE

¹We are not holding that Mr. Jackson and Mr. Hayes committed malpractice, only that Dr. Shofner knew of the specific problems which she alleged to be malpractice, by March 21, 2003.